

**State Bar Court
Program for Respondents with
Substance Abuse and Mental Health Issues**

Program Outline

October 1, 2004

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State Bar Court Program for Respondents with Substance Abuse and Mental Health Issues

This document provides an overview of the State Bar Court Program for Respondents with Substance Abuse or Mental Health Issues (hereinafter “Program” or “State Bar Court Program”).

I. Program Authorization

Effective January 1, 2002, Business and Professions Code sections 6230, *et seq.* were added to the State Bar Act. Section 6231 directs the Board of Governors of the State Bar of California to establish and administer an Attorney Diversion and Assistance Program (hereinafter “Lawyers Assistance Program”). Additionally, section 6140.9 provides that the State Bar shall allocate at least \$10.00 of the annual membership fee paid by active members of the State Bar to offset all or a portion of the cost of establishing and administering the Lawyers Assistance Program.

The State Bar has implemented the Lawyer Assistance Program (“LAP”), which primarily addresses the substance abuse and mental health problems of attorneys who are referred to LAP or who voluntarily seek to participate in LAP. The program offers support and structure to attorneys recovering from these disorders. Experts provide consultations regarding rehabilitation and private support groups are offered to attorneys in the program.

The State Bar Court Program addresses the substance abuse and mental health problems of attorneys against whom formal disciplinary proceedings have been initiated in the State Bar Court (hereinafter “respondents”).

II. Scope of Program

The State Bar Court Program represents the first comprehensive program in the United States for addressing the identification, assessment and treatment of substance abuse and mental health problems of respondents in the discipline process. The Program is designed to protect the public, the courts and the legal profession, while respondents with substance abuse or mental health problems receive treatment.

The State Bar Court Program has a close and mutually beneficial relationship with LAP. The Program neither duplicates the LAP processes nor usurps the treatment function. The Program seeks to identify and refer respondents with substance abuse or mental health problems to LAP so that respondents so afflicted may be treated and rehabilitated. A respondent must be accepted into LAP in order to be eligible for the State Bar Court Program.

Cognizant of its obligation to protect the public, the courts and the legal profession, the State Bar Court retains jurisdiction over those attorneys in LAP that have pending disciplinary proceedings and makes all appropriate judicial decisions, including any determination regarding the respondent's eligibility to practice law while participating in LAP.

III. Treatment and the Disciplinary Process

There are three identifiable stages at which an attorney may become involved in LAP to receive treatment. They are:

- Self-referral prior to or after the receipt of any disciplinary complaint;
- Referral by the Office of the Chief Trial Counsel following the receipt of a disciplinary complaint but prior to the initiation of a proceeding in the State Bar Court; or
- After the initiation of a disciplinary proceeding in the State Bar Court, or pursuant to a stipulation to jurisdiction by the parties in a pre-filing matter.

A respondent is entitled to make a self-referral to LAP for treatment even if he or she has a disciplinary complaint or proceeding pending. The respondent will be subject to any terms and conditions set forth by LAP for ongoing participation in that program. However, a respondent's participation in LAP does not limit or alter the State Bar Court's authority to impose or to recommend the imposition of discipline on members of the State Bar. Thus, a respondent's participation in LAP may not affect or defer a disciplinary proceeding unless the respondent is accepted into the State Bar Court Program.

IV. Eligibility for the State Bar Court's Program

A. Referral to LAP by the State Bar Court

In a State Bar Court proceeding, when an issue of substance abuse or mental health is raised (whether by the Deputy Trial Counsel, the respondent or the Hearing Judge), the assigned Hearing Judge may refer the matter to the Hearing Judge who presides over the Program in the appropriate venue of the State Bar Court ("Program Judge") solely to determine whether the respondent is a potential candidate for the program.

Once the referral is made, an initial status conference with the Program Judge is scheduled as quickly as possible, preferably within one week of the referral. At the initial status conference with the Program Judge, the Judge informs the respondent about the terms and conditions of his or her potential participation in the Program.

If the Program Judge concludes that the respondent is a good potential candidate for the program based upon the respondent's willingness to abide by the terms and conditions of the Program, and the respondent's acknowledgment that he/she has a substance abuse or mental health problem, the respondent is referred to LAP to begin the evaluation process to determine participation eligibility in LAP. The Program Judge submits a written referral to LAP with a date certain by which the respondent is to contact LAP to start the evaluation process. LAP notes on the written referral whether or not the respondent made contact within the time allotted and promptly returns the referral to the State Bar Court for verification of the respondent's initial compliance.

If the Program Judge does not recommend that the respondent should participate in the Program, the proceeding is returned to the assigned Hearing Judge for normal case processing. In that case, however the respondent is still free to pursue treatment from LAP through a self-referral.

If the respondent denies at the initial status conference that he/she has a substance abuse or mental health problem, or does not agree to contact LAP for the evaluation process, the Program Judge informs the respondent that he/she will not be allowed to request referral to the Program at a later date in the proceedings. The Program Judge also informs the respondent that his or her initial denial of a problem may be considered in subsequently determining whether mitigation credit for a substance abuse or mental health problem is appropriate in his/her disciplinary proceeding. If the respondent is unwilling to contact LAP or fails to contact LAP within the time set forth in the written referral, the proceeding is returned to the assigned Hearing Judge and the disciplinary proceeding conducted in the normal course.

If the respondent accepts the referral to LAP and contacts LAP within the time set forth in the written referral, the proceedings are reassigned to the Program Judge for all purposes, except that, if the respondent is not subsequently accepted into LAP, the proceedings are returned to the originally-assigned Hearing Judge for reassignment and normal case processing.

B. Evaluation Process for Participation in LAP

Following a written referral, the evaluation process by LAP is estimated to take approximately 90 days. The respondent must comply with all terms and conditions specified by LAP as part of the evaluation process, including any participation in group meetings, attendance at abstinence-based self-help meetings or random drug testing. Failure to comply with any condition of the evaluation process required by LAP may result in the respondent's rejection from participation in the Program.

The respondent may also be required to obtain an addiction evaluation and/or psychiatric evaluation by a treatment professional as part of the LAP evaluation process. At a minimum, such an evaluation will include: history of alcohol and drug use; past medical

and psychiatric history; history of professional practice; drug testing results; review of records including collateral contacts; summary, including diagnostic considerations and formulation; and recommendations, including precautions or limitations for practice and recommendations for ongoing treatment, with the data and supporting rationale for the recommendations.

Any restrictions on the respondent's practice in either the evaluation report or the LAP Participation Agreement are provided only as recommendations for the Program Judge to consider. For respondents participating in the Program, LAP will not place practice restrictions on the respondent as a term or condition of participation in its program. Any determination as to restrictions on practice for respondents will be made by the Program Judge and set forth in an appropriate order. LAP may require respondents to comply with any court orders regarding restrictions on practice as a condition of LAP participation.

If the respondent is accepted into LAP at the completion of the evaluation process, the respondent provides to the Program Judge copies of the LAP Participation Agreement and the evaluation report from the treatment professional. The Program Judge will use these documents to determine the respondent's eligibility for the State Bar Court Program.

If the respondent is not accepted into LAP, he or she will not be eligible to participate in the Program and the proceeding will be returned to the originally-assigned Hearing Judge for re-assignment and normal case processing.

C. Stipulation as to the Disciplinary Proceeding

After the respondent is determined to be a potential candidate for the Program and is referred to LAP for an evaluation for participation, the Program Judge also directs the respondent and Deputy Trial Counsel to discuss the preparation of a stipulation as to facts, conclusions of law and mitigating and aggravating circumstances. The Stipulation should include, inter alia, the resolution of all outstanding restitution and Client Security Fund matters; all matters currently at issue with clients or courts; restrictions on practice, if any, and member status.

The Stipulation between the parties must be submitted to the Program Judge within 90 days of the initial status conference. The parties may request a settlement conference with the Program Judge in order to facilitate a stipulation. If the respondent and the Deputy Trial Counsel are unable to reach a stipulation, the respondent will not be permitted into the Program but may continue to seek participation in LAP.

D. Eligibility Determination by Program Judge

The respondent is ordered to appear before the Program Judge approximately 90 days after the initial referral to LAP. Based on receipt of the LAP Participation Agreement, the evaluation report from the treatment professional and the Stipulation, the Program Judge determines the respondent's eligibility based mainly on the answers to the following four questions:

1. Is the respondent suitable or amenable to treatment?
2. Is there a nexus between the respondent's behavior and his/her substance abuse or mental health problem?
3. Is the respondent willing to enter into a Stipulation?
4. Is the range of the ultimate discipline proposed by the parties, if any, within the State Bar Court Judge's discipline parameters?

If the respondent is not accepted into the Program, the proceeding is returned to the originally-assigned Hearing Judge for reassignment and normal case processing.

If the respondent is accepted into the Program and agrees to participate in the Program, he/she must sign a contract which includes the following terms, among others:

- Stipulation as to fact, conclusions of law and any mitigating or aggravating circumstances;
- An acknowledgment that, in the event that the respondent is terminated from the Program, the Stipulation will be filed, will become public and will be processed as part of the underlying disciplinary proceeding;
- An agreement to abide by all terms and conditions of the respondent's LAP Participation Agreement;
- Arrangement for payment of administrative and/or other fees;
- An agreement as to the "sanctions" and "incentives" that may be imposed based on the respondent's failure to comply with any condition of the program or his/her completion of each stage of the program.

Prior to signing the Program Contract, the Program Judge will, based upon the stipulation, provide the respondent with a tentative indication of the disposition that will be imposed or recommended if the respondent successfully completes the Program and the disposition that will be imposed or recommended if he or she does not successfully complete

the Program.

If the respondent does not agree to sign the Program Contract, the proceeding is returned to the originally-assigned Hearing Judge for reassignment and normal case processing. The Stipulation will be rejected and will not be binding upon either the respondent or the State Bar. The respondent, however, is free to pursue treatment from LAP.

If the respondent is accepted into the Program, the Stipulation will not be effectuated until the respondent either successfully completes the Program or is terminated from the Program. If all conditions are met and the respondent is accepted into the Program, the matter remains assigned to the Program Judge for all purposes.

E. Right to Seek Review

The respondent is entitled to seek review of a Program Judge's decision to deny admittance into the Program or to terminate the respondent from the Program pursuant to rule 300 of the Rules of Procedure of the State Bar. However, the respondent is not entitled to seek review of a Program Judge's decision to deny or terminate him or her from the Program if that decision was based on the respondent's denial of acceptance into LAP or termination from LAP. The decisions and determinations of LAP are not subject to review by the State Bar Court.

V. Participation in the State Bar Court's Program

A. Status Reports and Conferences

The State Bar Court Program provides oversight of its participants through status conferences held, at a minimum, every three months. In order to determine the respondent's progress, LAP provides written status reports to the Program Judge every three months. Based on objective data, the reports: (1) confirm the respondent's compliance with the terms and conditions of the LAP Participation Agreement, (2) disclose any incidents of non-compliance, and (3) provide any relevant case information which can be appropriately shared with the Program Judge in open court.

The Office of Probation of the State Bar also submits a written report on the respondent's compliance with all other terms and conditions of the Program Contract. The status reports by the Office of Probation and LAP are provided to the court no later than seven (7) days prior to the scheduled status conference. Neither the Office of Probation nor LAP are required to make regular, personal appearances at the status conferences. However, the Program Judge may occasionally request a telephonic appearance by a representative of the Office of Probation or LAP to answer questions or provide clarification regarding a submitted status report.

In order to meet the goals of the Program, there will be circumstances when

non-compliant respondents will need to appear before the court in an expeditious manner. The purpose of this procedure is to allow substantial flexibility and discretion to LAP and the Office of Probation in dealing with non-compliance before notifying the court. LAP and/or the Office of Probation will notify the court within five (5) days of receiving information of any of the following incidents of non-compliance:

- A single unexcused failure to test for drugs or alcohol;
- A second positive drug or alcohol test;
- A second unexcused failure to attend a counseling session;
- A new complaint of misconduct based on an event that occurred after acceptance into the Program.

The Program Judge has the discretion to order the respondent to personally appear at a special status conference or handle the matter in any other appropriate manner.

All treatment-related documents, including status reports, evaluation reports and tests results, are maintained in a confidential section of the court's file and may not be duplicated by any party. Treatment progress and status reports may only be used in court by the parties to evaluate the respondent's progress in the treatment program. The confidential documents are ordered sealed upon successful completion of or termination from the Program.

B. Sanctions and Incentives

The State Bar Court Program provides substantially more attorney accountability during a pending disciplinary proceeding than under the normal case processing system. Based on the status reports submitted by LAP and the Office of Probation, the Program Judge is able to monitor a respondent's progress and order appropriate sanctions or incentives.

Both sanctions and incentives are crucial to an effective court-based program. A sanction occurs after the prohibited act and as a response to that act. An incentive is the removal of a program obligation or requirement contingent on a targeted behavior. Incentives will be used whenever possible because they are generally far more effective than sanctions in altering behavior. Possible incentives include:

- Reduction in term of the Program at each three month status conference, resulting in a minimum term of 18 months;
- Waiver of the personal appearance requirement at a status conference;
- Reduction of time on inactive status while in the Program;

- Credit for inactive status towards any period of actual suspension imposed as part of discipline;
- Reduction in the frequency of status conferences.

Conversely, in the event the respondent fails to comply with the terms of the Program, possible sanctions include:

- Involuntary inactive enrollment;
- Publication of the attorney's name in the California Bar Journal or on the State Bar's website;
- Increased frequency of status conferences;
- Loss of credit for inactive status while in the Program towards actual suspension imposed as part of discipline;
- Termination from the Program.

C. Term of the Program

The respondent is required to participate for a minimum term of 36 months from formal admission into the Program. However, with earned incentives, the respondent may complete the program in a minimum of 18 months. No respondent may complete the program without a one-year substance-free certificate from LAP, or a recommendation from a mental health professional. It should be noted that probationary conditions may extend beyond the term of the formal Program, thereby requiring continued compliance with the respondent's LAP Participation Agreement.

The time necessary to successfully complete the Program may vary significantly depending upon the nature and extent of the respondent's substance abuse, mental health, or upon his/her performance in the Program.

While the respondent is participating in the Program, further processing of the disciplinary proceeding is deferred. All applicable statutes of limitation in the disciplinary proceeding are tolled while the respondent is participating in the Program. However, as deemed necessary for the protection of the public, the Program Judge may require the respondent to be enrolled as an inactive member of the State Bar during all or part of his/her participation in the Program.

Before a respondent is terminated from the Program, the Program Judge issues an order to show cause specifying the grounds upon which the court is contemplating the respondent's termination from the Program and providing the respondent with an opportunity

to demonstrate why he or she should not be terminated from the Program.

If the respondent is terminated from the Program without completing it, that fact may be used as an aggravating factor in the underlying disciplinary proceeding. In addition, the Stipulation entered into by the respondent and the Deputy Trial Counsel will be filed with the State Bar Court, will become public and will be processed as part of the disposition of the underlying disciplinary proceeding.

If the respondent successfully completes the Program, any period of inactive enrollment that has been imposed by the Program Judge may be credited towards the respondent's period of actual suspension in the underlying disciplinary proceeding. However, if the respondent is terminated from the Program, he or she will not be given credit for the period of inactive enrollment.

Respondents may choose to be involved in a drug or alcohol rehabilitation program or mental health treatment program other than LAP. However, unless that alternative treatment program is accepted by LAP as part of the respondent's participation in LAP, the respondent will not be accepted into the Program and the underlying disciplinary proceeding may not be deferred pending treatment. The mitigating effect of the respondent's substance abuse or mental health problem and subsequent rehabilitation will depend upon the nature and extent of the showing made in the course of the disciplinary proceeding.

VI. Disciplinary Offenses Excluded from the Program

Respondents who have been convicted of crimes which qualify for summary disbarment pursuant to Business and Professions Code section 6102 are not be entitled to participate in the Program.

However, no other respondent or category of charged offense is automatically excluded from potential participation in the Program. Even in those cases which may ultimately result in disbarment, the respondent's participation in the Program may not only assist the respondent with his/her mental health problems or in his/her recovery from substance abuse, but may also assist in demonstrating his/her rehabilitation for purposes of a later reinstatement proceeding.

VII. Confidentiality

The fact that the respondent is participating in the State Bar Court's Program is public. Likewise, the respondent's successful completion of the Program or dismissal from the Program is public. Documents that are submitted to the State Bar Court by the parties, the LAP and the Office of Probation are not public unless and until they are ordered filed by the Court. At the conclusion of the proceeding, all documents not ordered filed by the Court are sealed.

All information concerning the nature and extent of the respondent's treatment is confidential. This confidentiality is:

- Absolute unless waived by the attorney;
- Exempt from the provisions of Section 6086.1;
- Not discoverable or admissible in any civil proceeding without the written consent of the attorney to whom the information pertains;
- Not discoverable or admissible in any disciplinary proceeding without the written consent of the attorney to whom the information pertains;
- Except with respect to the provisions of subdivision (c) of Section 6232, the limitations on the disclosure and admissibility of information in this section does not apply to information relating to an attorney's non-cooperation with or unsuccessful completion of LAP, or any subcommittee or agent thereof, or to information otherwise obtained by the Office of the Chief Trial Counsel, by independent means, or from any other lawful source.